TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 126

INGRAM-DAY LUMBER COMPANY, PETITIONER,

vs.

SYDNEY C. McLOUTH, REVIVED AGAINST THE AMERICAN LOAN & TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF SYDNEY C. McLOUTH, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1927

CERTIORARI GRANTED NOVEMBER 14, 1927

(22,999)

(32,209)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 642

INGRAM-DAY LUMBER COMPANY, PETITIONER,

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 30, 1926

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IN THE

District Court of the United States

FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

DECLARATION

(Filed Aug. 2, 1920).

Eastern District of Michigan, Southern Division, ss.

Ingram-Day Lumber Company, which at all the times hereinafter mentioned, was and still is a corporation organized and existing under the laws of the State of Wisconsin and of no other state, having its office and principal place of business in the City of Eau Claire, Eau Claire County, State of Wisconsin, and was and still is a citizen of the State of Wisconsin and a resident of the City of Eau Claire, Eau Claire County, State of Wisconsin, and a resident of the Western District of Wisconsin, by Miller, Canfield, Paddock and Perry, its attorneys, complains of Sydney C. McLouth, who at all the times hereinafter mentioned, was and still is a citizen of the State of Michigan and a resident of the City of Marine City, in the County of St. Clair and State of Michigan, and a resident of the Eastern District of Michigan, of a plea of trespass on the case upon promises, filing this declaration as commencement of suit.

I.

For that whereas heretofore, on or about, to-wit, February 5, 1919, the plaintiff and the defendant made and entered into a certain contract, a true copy of which, marked Exhibit "A," is hereto attached and expressly made a part hereof in all respects as if herein inserted, reference to which contract is hereby expressly made.

For that whereas heretofore on or about, to-wit, February 5, 1919, the plaintiff and the defendant made

and entered into a certain supplemental understanding in connection with said contract Exhibit "A," a true copy of which supplemental understanding, marked Exhibit "B," is hereto attached and expressly made a part hereof in all respects as if here inserted, reference to which supplemental understanding, Exhibit "B," is hereby made.

For that whereas heretofore on or about, to-wit, March 7, 1919, the plaintiff and the defendant made and entered into a certain amendment of said contract Exhibit "A," said amendment being evidenced by written communications between the plaintiff and the defendant, marked respectively Exhibit "C," Exhibit "D" and Exhibit "E," which exhibits are hereto attached and expressly made a part hereof in all respects as if here inserted, reference to which Exhibits "C," "D" and "E" is hereby expressly made.

For that whereas heretofore, to-wit, on February 5, 1919, at, to-wit, Marine City, Michigan, in consideration that the said defendant at the request of the said plaintiff had, as aforesaid, bargained for and agreed to buy of the said plaintiff certain goods and chattels as aforesaid, to-wit, 1,537,032 feet of specially cut and manufactured lumber, all as more specifically described in said Exhibits "A," "B," "C," "D" and "E" aforesaid, to be delivered by said plaintiff as soon as cut and manufactured, and entirely within, to-wit, from four to six months, to the said defendant free on board the cars at, to-wit, the various mills of the plaintiff for the agreed price of $65.35 per thousand feet, board measure, (except as such price was amended in part by the provisions of said Exhibits "A," "B," "C," "D" and "E") to be then and there paid by the said defendant to the said plaintiff, the said plaintiff then and there at, to-wit, the time and place aforesaid promised the said defendant to sell to him goods and chattels as aforesaid and to deliver the same to the said defendant free on board the cars at the various mills of the said plaintiff, at the above prices all as aforesaid, as soon as cut and manufactured, and within on or about, to-wit, from four to six months after, to-wit, February 5, 1919.

And the said plaintiff avers that afterwards and on, to-wit, the 11th day of August, A. D. 1919, it was ready and willing, and then and there tendered and offered to deliver to the said defendant, the balance of lumber then due to the said defendant under said contract Exhibit "A" as mentioned as aforesaid, at the places and at the prices mentioned in said contract, amounting in all to, to-wit, 919,696 feet, board measure, of lumber, and then and there requested the said defendant to accept the same and to pay the said plaintiff for the same as aforesaid; yet the said defendant, not regarding his said promises, did not nor would when he was so requested, or at any time before or afterwards, although often requested so to do, accept the said balance of 919,696 feet board measure, of lumber as aforesaid, or any part thereof, nor pay the said plaintiff for the same, but wholly neglected and refused, and still neglects and refuses so to do. To the plaintiff's damage $100,000.00 and therefore it brings suit.

II.

And plaintiff for a further cause of action against the defendant avers the following:

For that whereas the said defendant heretofore, to-wit, on the 2nd day of February, A. D. 1920, at, to-wit, the city of Lyman, in said County of Harrison and State of Mississippi, was indebted to the plaintiff in the sum of, to-wit, $64,314.96, for the price and value of goods then and there sold and delivered by the plaintiff to the defendant at his request.

And in a like sum for the price and value of work then and there done and materials for the same furnished by the plaintiff for the defendant at his request.

And in a like sum for money then and there lent by the plaintiff to the defendant at his request.

And in a like sum for money then and there paid by the plaintiff for the use of the defendant at his request.

And in a like sum for money then and there received by the defendant for the use of the plaintiff.

And in a like sum for money then and there found

to be due from the defendant to the plaintiff on an account stated between them.

And thereupon the said defendant afterwards, and on to-wit the day and year aforesaid, in consideration of the premises respectively, then and there promised to pay to the plaintiff the said several sums of money respectively on request; yet the said defendant (although often requested so to do), has disregarded his said promises and has not paid any of the sums of money or any part thereof.

To the plaintiff's damage of $100,000.00 and therefore it brings suit.

Miller, Canfield, Paddock & Perry,
Attorneys for the Plaintiff.
Business Address:
2148 Penobscot Building,
Detroit, Michigan.

White & Ford,
Of Counsel for the Plaintiff,
Business Address:
Gulfport, Mississippi.

EXHIBIT "A"

"INGRAM-DAY LUMBER COMPANY

Lyman, Miss., 2/5/1919.

Sydney C. McLouth, Esq.,
Marine City, Michigan.

Dear Sir:

In accord with verbal understanding this day had with your Mr. Jno. J. Manley, we are entering your order as follows. From your schedule dated 12/13/18 headed "Balance of Flitches required to complete four tugs."

Dense Merchantable Yellow Pine

Rough, Bark Edge Flitch 192 pcs. 9x27 or wider 8'
" " " " 9x30 or wider 300' lin.
" " " " 9x26 or wider 1280' "
" " " " 9x24 or wider 868' "
" " " " 9x22 or wider 2153' "
" " " " 9x20 or wider 1977' "
" " " " 9x18 or wider 4032' "
These items to be in long lengths, the number of lineal feet of each width the Flitch contains to be counted separately. No face to be less than 18".
" " " " 16 pcs 10x30 or wider 8'
" " " " 16 pcs 10x30 or wider 9'
" " " " 16 pcs 10x30 or wider 10'
" " " " 48 pcs 10x18 or wider 4'
" " " " 48 pcs 10x18 or wider 6'
" " " " 48 pcs 10x18 or wider 8'
" " " " 48 pcs 10x16 or wider 8'

The above being in all approximately 227,000'.

And from your schedule dated 1/9/19 headed contract No. 457 W. C. Timber order for Tugs, etc.

Dense Merchantable Yellow Pine

15 Pcs. 14x14 46' 8"8 to 13¾x13¾
5 " " 16' " "
5 " " 38' " "

10	"	"	46'	"
5	"	"	16'	"
10	"	12x14	28'	"
10	"	"	46'	"
5	"	"	14'	"
20	"	"	46'	"
5	"	"	38'	"
5	"	"	28'	"
5	"	14x16	20'	"
5	"	14x14	14'	"
5	"	12x12	14'	"
5	"	"	16'	"
10	"	10x10	18'	"
5	"	14x14	14'	"
5	"	"	22'	"
5	"	10x14	10'	"
10	"	10x12	44'	"

$11\frac{3}{4}$x$13\frac{3}{4}$
"
"
"
"
"
"
$13\frac{3}{4}$x$15\frac{3}{4}$
$13\frac{3}{4}$x$13\frac{3}{4}$
$11\frac{3}{4}$x$11\frac{3}{4}$
"
$9\frac{3}{4}$x $9\frac{3}{4}$
$13\frac{3}{4}$x$13\frac{3}{4}$
"
$9\frac{3}{4}$x$13\frac{3}{4}$
$9\frac{3}{4}$x$11\frac{3}{4}$

Rough Bark Edge Flitch 120 Pcs. 9x26 or wider 14'
" 240 Pcs. 9x24 or wider 12'
" 9x30 or wider 580 lin. ft.

9x27	"	2100	"
9x26	"	1600	"
9x24	"	1890	"
9x22	"	2910	"
9x20	"	4000	"
9x18	"	7100	"
9x16	"	1880	"
9x14	"	2500	"

These items to be in long length. The number of lineal feet of each width the flitch contains to be counted separately. No face to be less than 14".

30	Pcs.	3x9	—16'	848 to $2\frac{3}{4}$x$8\frac{3}{4}$
30	"	"	20'	"
5	"	10x10	26'	"
60	"	8x8	16'	"
10	"	"	14'	"
45	"	"	12'	"
20	"	"	10'	"

$9\frac{3}{4}$x$9\frac{3}{4}$
$7\frac{3}{4}$x$7\frac{3}{4}$
"
"
"

10	"	$6\frac{1}{4}$x12	22'	S2S	6x12	
10	"	"	24'	"	"	
10	"	"	28'	"	"	
10	"	"	32'	"	"	
10	"	"	36'	"	"	
10	"	"	38'	"	"	
90	"	"	40'	"	"	
10	"	"	42'	"	"	
30	"	"	44'	"	"	
10	"	"	48'	"	"	

$4\frac{1}{4}$x12—28 to 40' 6000 lin. ft. S2S to 4x12
8 x12—30 to 50' 16500 lin. ft. S2S to $7\frac{3}{4}$x12
7 x12—24 to 46' 7200 lin. ft. S2S to $6\frac{3}{4}$x12
$2\frac{1}{4}$x12— 1400 lin. ft. S2S to 2x12

10	Pcs.	6x9	40'	S4S	to	$5\frac{3}{4}$x$8\frac{3}{4}$
20	"	"	34'	"	"	"
10	"	"	30'	"	"	"
50	"	$4\frac{1}{4}$x8	42'	"	"	4x$7\frac{3}{4}$
50	"	"	40'	"	"	"
50	"	"	38'	"	"	"
50	"	"	32'	"	"	"
10	"	8x10	32'	"	"	$7\frac{3}{4}$x$9\frac{3}{4}$
10	"	"	38'	"	"	"
20	"	"	40'	"	"	"
30	"	8x12	40'	S2S	"	$7\frac{3}{4}$x12
10	"	"	20'	"	"	"
10	"	$5\frac{1}{4}$x12	28'	"	"	5x12
10	"	"	36'	"	"	"
10	"	"	32'	"	"	"
10	"	"	40'	"	"	"
5	"	10x12	28'	S4S	"	$9\frac{3}{4}$x$11\frac{3}{4}$
15	"	"	30'	"	"	"
30	"	10x10	30'	"	"	$9\frac{3}{4}$x$9\frac{3}{4}$
5	"	10x12	28'	"	"	$9\frac{3}{4}$x$11\frac{3}{4}$
35	"	10x10	28'	"	"	$9\frac{3}{4}$x$9\frac{3}{4}$
25	"	"	26'	"	"	"
30	"	"	24'	"	"	"
10	"	"	22'	"	"	"
10	"	"	20'	"	"	"
10	"	"	18'	"	"	"

10	"	"	16'	"	"	$9\frac{3}{4}$x$9\frac{3}{4}$
5	"	"	14'	"	"	"
10	"	10x10	12'	"	"	$9\frac{3}{4}$x$9\frac{3}{4}$
30	"	"	10'	"	"	"
30	"	9x10	9'	"	"	$8\frac{3}{4}$x$9\frac{3}{4}$
20	"	10x12	6'	"	"	$9\frac{3}{4}$x$11\frac{3}{4}$
160	"	10x10	6'	"	"	$9\frac{3}{4}$x$9\frac{3}{4}$
10	"	10x10	4'	"	"	"
20	"	10x14	4'	"	"	$9\frac{3}{4}$x$13\frac{3}{4}$

Send suitable lengths to cut these pieces.

60	"	10x10	3'	"	"	$9\frac{3}{4}$x$9\frac{3}{4}$
35	"	8x10	28'	"	"	$7\frac{3}{4}$x$9\frac{3}{4}$
15	"	"	26'	"	"	"
5	"	"	24'	"	"	"
10	"	10x10	24'	"	"	$9\frac{3}{4}$x$9\frac{3}{4}$
10	"	8x10	22'	"	"	$7\frac{3}{4}$x$9\frac{3}{4}$
15	"	"	20'	"	"	"
10	"	"	18'	"	"	"
5	"	"	16'	"	"	"
5	"	"	14'	"	"	"
5	"	10x10	14'	"	"	$9\frac{3}{4}$x$9\frac{3}{4}$
10	"	6x10	12'	"	"	$5\frac{3}{4}$x$9\frac{3}{4}$
5	"	8x10	12'	"	"	$7\frac{3}{4}$x$9\frac{3}{4}$
5	"	8x10	8'	"	"	"
20	"	9x10	7'	"	"	$8\frac{3}{4}$x$9\frac{3}{4}$
5	"	8x10	6'	"	"	$7\frac{3}{4}$x$9\frac{3}{4}$

Send suitable lengths to cut these pieces.

10	"	10x10	24'	"	"	$9\frac{3}{4}$x$9\frac{3}{4}$
10	"	"	26'	"	"	"
10	"	"	30'	"	"	"

$4\frac{1}{4}$x12—20 to 46' 11080 lin. ft. S2S to 4x12
$4\frac{1}{4}$x 8—20 to 40' 13000 lin. ft. S2S to 4x8
$4\frac{1}{4}$x10—20 to 40' 15000 lin. ft. S2S to 4x10
$5\frac{1}{4}$x 8—20 to 40' 11200 lin. ft. S2S to 5x8

20	Pcs.	$5\frac{1}{4}$x12—	24'	S2S	to	5x12
20	"	"	30'	"	"	
20	"	"	36'	"	"	
40	"	"	40'	"	"	

$3\frac{1}{4}$x6 3400 lin. ft. S2S to 3x6
$3\frac{1}{4}$x4 5000 " " " 3x4

$4\frac{1}{4}$x6 1700 " " " 4x6
$2\frac{1}{4}$x4 1700 " " " 2x4
10 Pcs. 5x22" or wider 24' S2S $4\frac{3}{4}$" Thick—Bark Edges
20 " 5x24" " 24' " " "
10 " 5x18" " 24' " " "
10 " " " 46' " " "
10 " 5x22" " 36' " " "
5 " 5x24" " 16' " " "
$3\frac{3}{4}$x$4\frac{1}{4}$ 45000 Bd. ft. S4S $3\frac{1}{2}$x4 Edge Grain
Edge grain is to be on the four-inch side of the timber.
5 " 5x6—20' S2S to $4\frac{3}{4}$x6
10 " " 30' " "
10 " " 32' " "
10 " " 24' " "
15 " 5x14 10' " $4\frac{3}{4}$x14
5 " 5x16 8' " $4\frac{3}{4}$x16
$2\frac{1}{4}$x6—16 to 28' 6500 Bd. ft. S4S to 2x$5\frac{3}{4}$
20 " 5x18 14' S2S to $4\frac{3}{4}$x18
10 " " 18' " $4\frac{3}{4}$x16
20 " 5x16 24' " $4\frac{3}{4}$x16
10 " 5x14 30' " $4\frac{3}{4}$x14
10 " 5x16 18' " $4\frac{3}{4}$x16
10 " 5x18 12' " $4\frac{3}{4}$x18
15 " 5x22 18' " $4\frac{3}{4}$x22
10 " 5x12 14' " $4\frac{3}{4}$x12
10 " " 20' " "
10 " 5x14 18' " $4\frac{3}{4}$x14
10 " 5x6 28' " $4\frac{3}{4}$x6
10 " " 36' " "
10 " " 26' " "
5 " 5x18 8' " $4\frac{3}{4}$x18
10 " 5x16 10' " $4\frac{3}{4}$x16
5 " 12x16 16' S4S $11\frac{3}{4}$x$15\frac{3}{4}$
5 " " 14' " "
5 " " 12' " "
5 " 10x16 10' " $9\frac{3}{4}$x$15\frac{3}{4}$
5 " 16x16 7' " $15\frac{3}{4}$x$15\frac{3}{4}$
4x10 7500 bd. ft. Rough
$1\frac{1}{4}$x10 10500 bd. ft. Rough
5 " 12x12 22' S4S to $11\frac{3}{4}$x$11\frac{3}{4}$

5	"	12x12	28' "	"
45	"	9x9	20' "	$8\frac{3}{4}$x$8\frac{3}{4}$
45	"	"	18' "	"
10	"	12x14	28' "	$11\frac{3}{4}$x$13\frac{3}{4}$
10	"	"	24' "	"
10	"	"	22' "	"
10	"	"	20' "	"
10	"	"	18' "	"
20	"	12x12	18' "	$11\frac{3}{4}$x$11\frac{3}{4}$
5	"	14x14	36' "	$13\frac{3}{4}$x$13\frac{3}{4}$
5	"	"	28' "	"
5	"	"	22' "	"

The above being in all approximately 1,300,000'.

We are beginning work on the order today.

Shipment on the above schedules will begin within about two weeks. We will especially exert ourselves to ship the first of the above schedules very promptly and we will work toward getting the material on the other schedule shipped in the order you have indicated. However, as explained to Mr. Manley, we expect to ship any item on either of the schedules as soon as it is ready. We expect to complete the entire order in from four to six months.

The price will be $65.35 per 1000 B. M. F. O. B. cars our various mills.

Shipments will be made to you at Marine City, Michigan.

Terms will be cash less 2% within ten days from date of invoice.

Assuming that all above is in line with your understanding, we will ask you to accept and return one copy of this memorandum.

Yours truly,
Ingram Day Lumber Company.
Per Wilson.

Accepted:
S. C. McLouth.

EXHIBIT "B"

INGRAM DAY LUMBER COMPANY

Lyman, Miss., 2/5/19.

Sidney C. McLouth, Esq.,
Marine City, Michigan.

Dear Sir:—

Referring to enclosed formal memorandum of sale, we beg to say that our price of $65.35 is made up as follows:

Our price on the separate flitch schedule and the first three tug schedules which we made sometime since was $64.50 mill which we have held open by understanding with Mr. Manley. There is approximately 1,007,000' of the above.

Since that quotation was made the market has advanced sharply so that our price today on the two additional tug schedules which Mr. Manley is ordering is $67.00 mill. Of this there is approximately 520,000'. For convenience in invoicing we strike an average price on all of it as follows:

1007000'	at	$64.50	$64951.50
520000'	at	67.00	34840.00
Total 1527000'	at	65.35	$99791.50

We trust this is clear and satisfactory.

The business is appreciated very highly and we hope to have the pleasure of serving you often.

We specialize in the production of shipbuilding material and are always in position to get out difficult sizes in Yellow Pine and Oak.

Yours truly,
Ingram Day Lumber Company,
Per Wilson.

Accepted:
S. C. McLouth.

EXHIBIT "C"

SLYNEY C. McLOUTH

VESSELS

MARINE CITY, MICH.

1401 Lumber Exchange Bldg.
Chicago, Ill., Feb. 28, 1919.

Ingram-Day Lumber Co.,
Lyman, Miss.

Attention Mr. Mitchell.

Gentlemen:

I am just in receipt of advice from Marine City listing a few changes as directed by the American Bureau of Shipping as follows:

"Owing to the fact that the American Bureau of Shipping requires longer scarfs in the side, bilge and floor ceiling, it necessitates our using longer material. We wish you would have items 17, 18 and 19 on our last lumber schedule dated January 9th, 1919, changed to read as follows:

17—Side Ceiling	$4\frac{1}{4}$x12	1200 lin. ft.	828	40 to 50
18—Bilge "	8x12	3300 " "	"	40 to 50
19—Floor "	7x12	1440 " "	"	40 to 50

Then referring to items 29, 30, 31 and 32 of this same schedule, we would like to have the mills understand that we cannot use more than 15 per cent from 20 to 30 ft. long, and 25 per cent from 30 to 40 ft. long. The balance of these items are to be 40 to 46 ft. These items are the bottom plank, bilge plank, side plank and wale strake."

Will you kindly make the proper notations on your orders and see that the mills cutting same are instructed accordingly at once, acknowledging receipt of our instructions.

To date I have received but one invoice covering about 10 M' of flitch material, but trust that you have several cars on the way by this time. Please bear down all possible on this flitch stock, as the yard is badly in need of it.

Yours very truly,

JJM.AMB

Jno. J. Manley.

P. S. Assume all sticks will bear our item number on end for purpose of identification and to facilitate checking.

EXHIBIT "D"

INGRAM DAY LUMBER COMPANY

Lyman, Miss., March 3, 1919.

Mr. John J. Manley,
No. 1401 Lumber Exchange,
Chicago, Illinois.

My dear Mr. Manley:

We are this morning in receipt of your letter of the 28th, and are very sorry to note the changes which Mr. McLouth desires to have made in his schedule, especially as we find that these changes are of considerable moment and make the schedule vastly more difficult.

Change No. 1 item 17, the total board measure amounts to 25,500 ft. and changing the specification from 28 to 40 ft., making it read 40 to 50 ft., will render the item worth $20.00 per m ft. additional, or $510.00.

Change No. 2 item 18, the total board measure amounts to 132,000 ft., and changing the specification from 30 to 50' making it read 40 to 50' will render the item worth $10.00 per M. ft. additional or $1320.00.

Change No. 3 item 19, the total board measure amounts to 45,400 ft., and changing the specification from 24 to 40', making it read 40 to 50' will render the item worth $20.00 per M. ft. additional or $908.00.

Change No. 4, item 29, the total board measure amounts to about 45,000 ft., and changing the specification to new lengths will render this item worth $15.00 per M ft. additional or $675.00.

Change No. 5, items 30, 31 and 32, the total board measure amounts to approximately 130,000 ft., and changing the specification to new lengths will render this item worth $20.00 per M additional or $2600.00.

You will, therefore, perceive that we would want a total of $6013.00 to justify us in making all the changes asked for. We very much prefer having the schedule without these changes and we sincerely hope when you

have fully concluded the matter that you will instruct us accordingly. However, you have the figures before you and we await your advices concerning them.

Yours truly,

A. S. Mitchell,
General Manager.

ASM/W

EXHIBIT "E"

Telegram

Marine City, Mich.,
March 7, 1919.

Ingram Day Lumber Company,
Lyman, Miss.

Please make changes in items seventeen eighteen nineteen twenty nine thirty thirty one thirty two of ceiling and planking as per your proposition of March third.

S. C. McLouth.

DEFENDANT'S PLEA

(Filed Dec. 22, 1920).

Comes now the defendant, Sidney C. McLouth, by John E. Kinnane, United States Attorney for the Eastern District of Michigan, Southern Division, and defends the wrong and injury, when, etc., and says that he does not owe the said sum of money demanded or any part thereof, and that he did not undertake and promise in the manner and form as the said plaintiff has in its

declaration and in each count thereof complained against him; and of this the defendant puts himself upon the country, etc.

John E. Kinnane,
United States Attorney.

STIPULATION WAIVING JURY

(Filed Sept. 18, 1923)

It is hereby stipulated and agreed, between the attorneys for the respective parties hereto, that a trial by jury in this action be and the same hereby is waived; and that the issues of fact herein may be tried and determined by the District Court of the United States for the Eastern District of Michigan, Southern Division, without the intervention of a jury; and that said court shall make special findings of fact herein, which shall have the same effect as the verdict of a jury, and also conclusions of law thereon.

Dated, July 6th, 1923.

Miller, Canfield, Paddock & Stone,
Plaintiff's Attorneys.
Earl J. Davis, U. S. Attorney,
Defendant's Attorney.
By F. L. Eaton,
Assistant.

SUGGESTION OF DEATH OF DEFENDANT

(Filed Nov. 15, 1923).

Now comes the plaintiff in the above entitled cause, by Miller, Canfield, Paddock & Stone, its attorneys, and causes the court to understand and to be informed that Sydney C. McLouth, the defendant in the above entitled cause, died on or about September 22nd, 1923, at Marine City, Michigan.

That on or about the 29th day of October, A. D. 1923, The American Loan & Trust Company of Detroit, Michigan, was appointed administrator of the estate of the said Sydney C. McLouth, defendant aforesaid, by the Probate Court of St. Clair County, Michigan, and that after said appointment the said The American Loan & Trust Company duly qualified as such administrator and is now the duly appointed, qualified and acting administrator of the estate of the said Sydney C. McLouth, as more fully appears from a certified copy of the letters of administration hereto attached and made a part hereof.

Now, therefore, the said plaintiff moves the court that an order be entered by this honorable court reviving said cause of action, and that the said The American Loan & Trust Company, as administrator of the estate of the said Sydney C. McLouth, be substituted as defendant in the above entitled cause and that a writ of scire facias issue to the said The American Loan & Trust Company, administrator as aforesaid, in accordance with the statute in such case made and provided.

This motion is based upon the records and files in said cause, upon the certified copy of letters of administration of the estate of Sydney C. McLouth and the affidavit of William J. Shaw, hereto annexed.

Miller, Canfield, Paddock & Stone,
Attorneys for Plaintiff.

State of Michigan, County of Wayne, ss:

William J. Shaw, being first duly sworn, deposes and says that he is associated with Miller, Canfield, Paddock & Stone, attorneys for the plaintiff in the above entitled cause, and that said Sydney C. McLouth, defend-

ant in the above entitled cause, died at Marine City, Michigan, or or about the 22nd day of September, A. D. 1923, as this deponent is informed and verily believes.

William J. Shaw.

Subscribed and sworn to before me this 15th day of November, A. D. 1923.

Bertha M. Waldron,
Notary Public, Wayne County, Michigan.
My commission expires Aug. 16, 1927.

ORDER APPOINTING ADMINISTRATOR

State of Michigan, the Probate Court for the County of St. Clair.

At a session of said court, held at the Probate Office in the City of Port Huron, in said county, on the 29th day of October, A. D. 1923.

Present, Hon. Clair R. Black, Judge of Probate.

In the matter of the estate of Sydney C. McLouth, deceased.

This day having been appointed for hearing the petition of Peirce McLouth, son of said deceased, praying that the administration of said estate be granted to The American Loan & Trust Company of Detroit, Mich., or to some other suitable person and due notice of the hearing on said petition having been given as directed by this court, the said petitioner appeared in person and by his attorney, H. L. Stevens.

It appearing to the court that the said deceased died on the 22nd day of September, A. D. 1923, intestate; that he was at the time of his death, an inhabitant of the City of Marine City in said county; that he left an estate within said county to be administered; that it is necessary that an administrator of said estate be appointed, and that The American Loan & Trust Company of the City of Detroit, in Wayne County is a competent and suitable person for that trust;

It is ordered, that the said American Loan & Trust Company of Detroit, Mich., be and is hereby appointed administrator of said estate, and that it give bond in

the penal sum of five hundred thousand ($500,000.00) dollars.

Clair R. Black,
Judge of Probate.

BOND OF ADMINISTRATOR

State of Michigan, the Probate Court for the County of St. Clair.

In the matter of the estate of Sidney C. McLouth, deceased.

Know all men by these presents, that we, American Loan & Trust Company of Detroit, Michigan, as principal and Detroit Fidelity and Surety Company of Detroit, Michigan, as surety within the State of Michigan, are held and firmly bound and obliged unto Clair R. Black, Judge of Probate in and for said county, in the full sum of five hundred thousand and no 100 ($500,000.00) dollars, lawful money of the United States of America, to be paid unto said judge of probate, his successors in said office or assigns, to the true payment whereof we do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals this thirty first day of October, A. D. 1923.

The condition of this obligation is such, that if the above bounden American Loan & Trust Company who has been appointed administrator of said estate, shall well and truly perform, observe and keep the conditions following, to wit:

1st. That they shall make and return to said court within thirty days, a true and perfect inventory of all the goods, chattels, rights, credits, and estate of said deceased which shall come to their possession or knowledge, or to the possession of any other person for them.

2nd. That they shall administer according to law all the goods, chattels, rights, credits, and estate of said deceased which shall at any time come to their possession or to the possession of any other person for them and out of the same pay and discharge all debts and charges chargeable on the same, or such dividends thereof as

shall be ordered and decreed by said court;

3rd. That they shall render a true and just account of their administration to said court within one year, and at any time when required by said court;

4th. That they shall perform all orders and decrees of said court, by the said administrator to be performed in the premises; then this obligation to be void and of no effect, otherwise to remain in full force and virtue.

American Loan & Trust Company,
Richard G. Lambrecht, Prest. (Seal)
P. O.
H. C. Jolly, Secretary. (Seal)
P. O.
Detroit Fidelity and Surety Company (Seal)
By Homer H. McKee, President (Seal)
Attest: Wm. J. Lewis, Asst. Secretary.

Note—Sureties on this bond must sign their names here and also on the back hereof, and justify before a notary public or justice.

State of Michigan, County of St. Clair, ss.

The Suret in the foregoing bond being duly sworn, each for himself, says that he is worth double the amount of the penalty in said bond, over and above all debts and legal exemptions in unencumbered property situated in said county.

(Surety sign here)
(Surety sign here)

Subscribed and sworn to before me, this day of A. D. 191

Notary Public, St. Clair County, Michigan.
My commission expires

I have examined and do approve the foregoing bond this 8th day of November, A. D. 1923.

Clair R. Black,
Judge of Probate.

LETTERS OF ADMINISTRATION

State of Michigan, the Probate Court for the County of St. Clair.

In the matter of the estate of Sydney C. McLouth,

deceased.

To American Loan & Trust Company, of the City of Detroit, Wayne County, Michigan, greeting:

You having been appointed administrator of said estate, and having given a bond in the premises which has been duly approved and filed as required by law, I do by these presents, commit unto you full power and authority to administer and faithfully dispose of, according to law, all and singular, the goods, chattels, rights, credits and estate of said deceased, which shall at any time come to your possession, or to the possession of any other person for you, and to ask, gather, levy, recover and receive all the goods, chattels, rights, credits and estate whatsoever of said deceased, which to him at the time of his death did belong; and to pay and discharge all debts and charges chargeable on the same, or such dividends thereon as shall be ordered and decreed by said court; hereby requiring you to make and return to said court, within thirty days, a true and perfect inventory of all the goods, chattels, rights, credits and real estate of said deceased which shall come into your possession or knowledge, or to the possession of any other person for you, and also to render a just and true account of your administration to said court within one year, and at least once in each year thereafter during your administration and at any other time when required by said court, and to perform all orders and decrees of said court by you to be performed in the premises.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the City of Port Huron, in said county, this 8th day of November, A. D. 1923.

Clair R. Black,
(Probate Court Seal) Judge of Probate.

EXEMPLIFICATION OF RECORD

State of Michigan, in the Probate Court for the County of St. Clair.

In the matter of the estate of Sydney C. McLouth, deceased.

I, Mildred E. Wright, Register of Probate, for said

county, having the legal custody of the files and records thereof, do hereby certify that I have compared the attached copy of order appointing administrator, bond of administrator and letters of administration, with the original thereof on file in said court, and have found the same to be a correct transcript therefrom, and the whole of such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Probate Court for said county, at the city of Port Huron, this 9th day of November, A. D. 1923.

Mildred E. Wright,
Register of Probate.

(Probate Court Seal)

APPEARANCE OF ADMINISTRATOR

(Filed Jan. 29, 1924).

To the Clerk:

Will you please enter my appearance for the American Loan and Trust Company, administrator, etc., defendant in the above entitled cause, said administrator having been substituted in the place of defendant Sidney C. McLouth, deceased.

F. L. Eaton,
Assistant United States Attorney.

To Miller, Canfield, Paddock & Perry, Attorneys for Plaintiff:

Please take notice that I have entered the appear-

ance of the administrator as defendant in the above entitled cause.

F. L. Eaton,
Assistant United States Attorney.

January 29, 1924.

PLEA OF THE AMERICAN LOAN AND TRUST COMPANY

(Filed Jan. 29, 1924).

And the said defendant, the American Loan and Trust Company, a Michigan corporation, administrator of the estate of Sidney C. McLouth, deceased, by Frederic L. Eaton, Assistant United States Attorney for the Eastern District of Michigan, comes and defends the wrong and injury when etc., etc., and says that the said Sidney C. McLouth, in his lifetime, and that said defendant since his decease did not, nor did either of them undertake or promise in manner and form as the plaintiff has complained against them, and that defendant demands a trial of the matter set forth in the plaintiff's declaration.

F. L. Eaton,
Assistant United States Attorney and Attorney for the American Loan & Trust Company, administrator.

January 28, 1924.

WAIVER OF TRIAL BY JURY

(Filed May 5, 1924).

It is hereby stipulated and agreed between the attorneys for the respective parties hereto, that a trial by jury in this action be and the same hereby is waived; and that the issues of fact herein may be tried and determined by the District Court of the United States for the Eastern District of Michigan, Southern Division, without the intervention of a jury; and that said court shall make special findings of fact herein, which shall have the same effect as the verdict of a jury, and also conclusions of law thereon.

Miller, Canfield, Paddock & Stone,
Plaintiff's Attorneys.
Delos G. Smith, U. S. Attorney,
By F. L. Eaton, Assistant,
Defendant's Attorneys.

Dated May 5, 1924.

REQUEST FOR FINDINGS OF FACT

(Filed May 19, 1924).

The plaintiff considering the facts hereinafter set forth to be proven, and deeming them material to the issues involved in this case, hereby requests the court to find the same as follows:

FIRST

That the plaintiff in this case is a Wisconsin cor-

poration. That the original defendant in this case was a citizen and resident of the State of Michigan. That after this cause was at issue the original defendant, Sydney C. McLouth, died; his death having been suggested to the court, said cause was properly revived against his administrator, The American Loan & Trust Company, a Michigan corporation.

SECOND

That on to-wit: February 5th, 1919, the plaintiff and said McLouth entered into a certain written contract, set forth as Exhibit "A" of plaintiff's declaration. This contract was slightly modified by a subsequent agreement between plaintiff and said McLouth, evidenced by letter of said McLouth's agent to plaintiff, dated Feb. 28, 1919, being Exhibit "C" of said declaration; plaintiff's letter to said McLouth dated March 3, 1919, being Exhibit "D" of said declaration; and telegram from said McLouth to plaintiff dated March 7, 1919, being Exhibit "E" of plaintiff's declaration; that under the terms of the contract of February 5th, 1919, as so modified, the plaintiff agreed to sell and the said McLouth agreed to buy 1,537,032 feet of especially cut and manufactured lumber at a contract price of $105,806.29.

THIRD

That prior to May 6th, 1919, in accordance with the said contract between the parties of February 5th, as modified, the plaintiff had prepared and shipped to said McLouth 617,366 feet of lumber, which lumber the said McLouth had accepted and paid for. (Depositions page 13).

FOURTH

On May 6, 1919, McLouth directed plaintiff to suspend further shipments and thenceforward refused performance of said contract on his part, although plaintiff

continued to tender performance of its obligations thereunder.

FIFTH

That when the plaintiff received the said McLouth's telegram of May 6th, 1919, the plaintiff had then completed the manufacture and preparation of 115,000 feet of lumber, except for dressing and loading costs, that it would have cost the plaintiff the sum of $400 to dress and load this 115,000 feet and that the resale value of this 115,000 feet of lumber amounted to the sum of $1,725. Deducting from the contract price the cost of dressing and loading, and the resale value of this particular 115,000 feet from the contract price of same, there is a balance due the plaintiff on this item amounting to the sum of $5,918.10. (Depositions pages 13-14-15).

SIXTH

That after deducting from the original contract the 617,366 feet set forth in the Third finding of fact and the 115,000 feet set forth in the Fifth finding of fact, the balance to be furnished under the contract amounted to 804,696 feet. (Depositions page 13).

SEVENTH

That on May 6th, 1919, the 804,696 feet set forth in the sixth finding of fact was still in the trees, but all original preparations for the manufacture of this lumber such as railroad facilities, the selection of the trees and the building of logging roads had been completed by the plaintiff. (Depositions pages 8 and 44-45).

EIGHTH

That it would have cost the plaintiff to complete the manufacture of the 804,696 feet of lumber referred to in the Sixth and Seventh findings of fact the sum of $19,400, which amount is derived from the total of the following items:

For	Timber	$10,000.00	
"	Logging	4,800.00	
"	Milling	2,500.00	
"	Dressing	1,300.00	
"	Loading	800.00	$19,400.00

(Depositions pages 21 and 46-47-48).

NINTH

That the contract price of the 804,696 feet referred to in the Sixth, Seventh and Eighth findings of fact amounted to the sum of $56,271.86. Deducting from the contract price the cost of manufacturing this lumber as appears from the Eighth finding of fact, I find a balance due to the plaintiff on this item amounting to the sum of $36,871.86.

TENTH

That the plaintiff was at all times able, ready and willing to perform the contract on its part, but said McLouth refused further performance on his part as found in the Fourth finding above.

ELEVENTH

That prior to entering into the contract of February 5th, 1919, the defendant furnished plaintiff certain schedules showing the size and quality of lumber required by the defendant, I find that these schedules nowhere mention that defendant had a contract with the United States Government or any agency thereof.

TWELFTH

That the contract of February 5th, 1919, between plaintiff and McLouth and the subsequent modifications thereof, contain no provision whatsoever providing for cancellation thereof.

THIRTEENTH

That the contract of February 5th, 1919, between

plaintiff and McLouth and the subsequent modifications thereof nowhere mention that McLouth had a contract with the United States Government, or any agency thereof.

FOURTEENTH

I further find that the first knowledge plaintiff had that McLouth was engaged in fulfilling a contract with the United States Government or any agency thereof, was after the receipt by plaintiff of a telegram from McLouth under date of May 6, 1919.

FIFTEENTH

That the United States Government, or any agency thereof, never modified, suspended, cancelled or requisitioned the contract of February 5th, 1919, between plaintiff and McLouth.

CONCLUSION OF LAW

FIRST

That the pleas filed on behalf of Sydney C. McLouth and the American Loan and Trust Company, administrator of the estate of Sydney C. McLouth, deceased, were pleas of non assumpsit, no notices of special defense having been attached to the pleas under Rule 44 of this court. All evidence of McLouth's dealings with the United States Government, or any agency thereof, is inadmissible and is excluded.

SECOND

There being no privity of contract between plaintiff and the United States Government, or any agency thereof, and the United States Government never having cancelled, modified, suspended or requisitioned the contract between plaintiff and McLouth, the Act of June 15th, 1917, (40 United States Statutes at Large 182), has no application to the facts in this case.

THIRD

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to judgment in the sum of $42,789.96, together with interest at 5% from August 5, 1918.

Respectfully submitted,

White & Ford,

Miller, Canfield, Paddock & Stone,

Attorneys for Plaintiff.

PETITION FOR LEAVE TO AMEND PLEA

(Filed Aug 12, 1924).

Now comes the above defendant by F. L. Eaton, Assistant United States Attorney for said District, and I. V. McPherson, Special Assistant to the Attorney General, and prays the court for leave to file an amended plea, a copy of which proposed amended plea is hereto attached. This motion is based upon the files, records and testimony in this case.

F. L. Eaton,

Assistant United States Attorney.

August 12, 1924.

AMENDED PLEA

(Filed Aug. 12, 1924).

For amended plea, comes now defendant, American Loan and Trust Company, administrator, estate of Sidney C. McLouth, deceased, by F. L. Eaton, Assistant United States Attorney for the Eastern District of Michigan, Southern Division, and I. V. McPherson, Special Assistant to the Attorney General, and defends the wrong and injury when etc., and says that defendant does not owe the said sum of money demanded, or any part thereof, and that the deceased, Sidney C. McLouth did not undertake and promise in the manner and form as the said plaintiff has stated in its declaration, and in each count thereof complained against him, and of this defendant puts itself upon the country, etc.

Frederic L. Eaton,
Assistant United States Attorney.
I. V. McPherson,
Special Assistant to the Attorney General,
Attorneys for Defendant.

To the above named plaintiff and its attorneys:

Please take notice that the defendant in the above entitled cause, upon the trial thereof, will give in evidence and insist in its defense, in addition to a denial of each and all of the allegations and matters set forth in plaintiff's declaration in the above entitled cause:

I.

That under and by virtue of the provisions of what is known as the "Shipping Fund Provision" of the Urgent Deficiencies Appropriation Act, approved June 15, 1917, the President of the United States was authorized and empowered, among other things, to place an order with any person or persons for such ships or materials as the necessities of the government, to be determined by the President, might require, during the war, and which were of the nature, kind and quality usually produced or capable of being produced by such person or persons.

II.

That under and by virtue of the provisions of the aforesaid act of Congress, the President was given full power and authority to modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or of materials.

III.

That by virtue of the provisions of said act of Congress, compliance with all orders issued thereunder was made obligatory on any person to whom the same was given, and the person to whom such order was given, was required to give the same precedence over all other orders and contracts placed with such person.

IV.

That by virtue of the provisions of such Appropriation Act, whenever the United States should cancel any contract for the purchase of ships or materials, it was provided that just compensation should be made therefor, by the President, and that if the amount of such compensation, as determined by the President, was unsatisfactory to the person entitled to receive the same, in such case it was provided that the President should pay to the person entitled to receive such compensation, seventy-five per cent of the same, so determined by him, and the person to whom the same was due, was entitled to sue the United States to recover such further sum as added to said seventy-five per cent would make up such an amount as would be just compensation to such person.

V.

That under and by virtue of the said "Shipping Fund Provision" of the said Act of Congress, the President was authorized to exercise the power and authority vested in him thereby, through such agents or agencies as he might determine.

VI.

That under and pursuant to the authority conferred upon him by the aforesaid Act of Congress, the President of the United States, by executive order, dated July 11, 1917, directed that the United States Shipping Board Emergency Fleet Corporation should have and exercise all the power and authority vested in him by the said Act of Congress aforesaid, insofar as the same authorized and empowered him to place orders for ships or materials, and all power and authority conferred upon him by said Act of Congress, to modify, suspend, cancel, or requisition existing or future contracts for the building, production, or purchase of ships or of materials therefor.

VII.

That, thereafter, and pursuant to the authority conferred upon it by the President's executive order, and acting within the scope of its authority thereunder, on August 21, 1917, acting for and on behalf of the United States, the United States Shipping Board Emergency Fleet Corporation made and entered into a contract with one Sidney C. McLouth, by the terms of which the said McLouth agreed to construct for the United States, four wooden ocean-going tugs for the price and sum of $232,000.00 each; and pursuant to the authority conferred upon it in said executive order, and acting within the scope of its agency powers, on September 17, 1917, said United States Shipping Board Emergency Fleet Corporation entered into an additional contract with the said Sidney C. McLouth, whereby the latter agreed to construct five wooden ocean-going tugs for $232,000.00 each.

VIII.

That, after entering into said contracts for the construction of the said tugs, the said Sidney C. McLouth immediately entered upon the performance of the same, and to procure the necessary materials for the construction thereof, on February 5, 1919, he entered into the

contract declared on in this action, between himself and the plaintiff.

IX.

That, all lumber manufactured by the plaintiff in accordance with the contract sued on, and put on board the cars in accordance with the terms thereof, prior to May 6, 1919, had been fully paid for by the said Sidney C. McLouth, at the contract price, and that by the terms of the said contract, no sum or amount was due or owing from the said Sidney C. McLouth to the plaintiff, on the said 6th day of May, 1919. No additional lumber than that which had been delivered and paid for in full, at the contract price, had been manufactured so as to entitle plaintiff under the terms of the contract sued on, to deliver the same, or so that the said Sidney C. McLouth would have been compelled by the terms of said contract, to receive and accept the same.

X.

That on April 29, 1919, the United States, acting by and through the United States Shipping Board Emergency Fleet Corporation, notified said Sidney C. McLouth to suspend all work on the tugs contracted for and to order all work stopped on commitments made by him as to those hulls, and to make no further commitments or expenditures as to them, and thereafter, on May 6, 1919, in obedience to the said notice and order, issued to him by the United States, by and through said United States Shipping Board Emergency Fleet Corporation, the said Sidney C. McLouth suspended the contract between himself and the plaintiff, and then and there notified plaintiff that his contract with the government for the construction of said tugs had been canceled, and notified plaintiff to stop further shipments of lumber under the contract entered into between himself and the plaintiff, and sued on in this action.

XI.

That, thereafter, on September 18, 1919, the United

States, acting by and through the United States Shipping Board Emergency Fleet Corporation, finally canceled the contracts entered into for the construction of said tugs, and ordered and directed the said Sidney C. McLouth, to notify all sub-contractors that his said contracts were definitely canceled, and to make no further contracts, and to incur no further expenditures in reference to said tugs.

XII.

That after the plaintiff was notified, on May 6, 1919, that the contract between McLouth and the government had been suspended, and after it was ordered to make no further shipments under the contract sued on, it accepted notice of the cancellation, and thereafter it neither manufactured nor shipped any of the lumber remaining to be manufactured and shipped under the said contract, and did not complete the manufacture of the lumber on which it was then engaged, or prepare any part of the same for delivery to defendant under said contract, but on the contrary, on account of the size and lengths of the ship timbers, it was then engaged in manufacturing, plaintiff remanufactured the same into such usual sizes, lengths, and dimensions as were saleable in its ordinary trade, and sold the same on its own account in the usual course of its business.

XIII.

That all of the lumber to be manufactured and delivered under the said contract was procured by the said McLouth to be used in the manufacture of the said tugs, which the said McLouth was constructing for the government under the said contract entered into between himself and the said United States Shipping Board Emergency Fleet Corporation, and it was to be specially cut and manufactured as ship timber, all of which the plaintiff at all times well knew.

XIV.

That, in entering into the contracts for the construction of the tugs, between itself and the said Sidney C. McLouth, and in suspending and canceling said contracts, and in directing the said Sidney C. McLouth to suspend his contract with the plaintiff, and to make no further contracts, commitments, or expenditures in relation to the said tugs, the said United States Shipping Board Emergency Fleet Corporation was acting as, and only as the agent and delegate of the President of the United States, and within the scope of its agency power under and by virtue of the authority conferred upon it by the executive orders of the President of the United States.

That the contract entered into between the plaintiff and the said Sidney C. McLouth and sued on in this action, was not breached by the said Sidney C. McLouth, but the said contract was frustrated and rendered legally impossible to be performed by the parties thereto, without the fault of either, and that the said Sidney C. McLouth was prevented from continuing in the performance of the same, and was prevented from accepting the balance of the lumber to be manufactured and delivered under the said contract sued on, by the intervention, direction, and command of the government of the United States, acting by and through the United States Shipping Board Emergency Fleet Corporation.

Frederic L. Eaton,
Asst. U. S. Attorney,
I. V. McPherson,
Attorneys for Defendant.

OPINION OF THE COURT WITH FINDINGS OF FACT

(Filed June 1, 1925).

Action at law for breach of contract.

White & Ford; Miller, Paddock, Canfield & Stone, for plaintiff.

Frederick L. Eaton, Assistant U. S. Attorney, Chauncey G. Parker, I. V. McPherson, of counsel, for defendant.

Simons, District Judge, plaintiff, a Wisconsin Corporation, entered into written contract with McLouth, a resident of Michigan, now deceased, on February 5th, 1919, whereby plaintiff would sell McLouth certain quantities of cut and manufactured lumber according to certain specifications furnished to plaintiff, the lumber to be used by McLouth in the building of tugs. McLouth, at the time of entering into the contract with plaintiff, had two contracts with U. S. Shipping Board Emergency Fleet Corporation for the construction of nine ocean going tugs. On or shortly before May 6th, 1919, McLouth received a telegram from the Fleet Corporation suspending further operations on his contract, whereupon, under date of May 6th, 1919, his purchasing agent wired plaintiff as follows:

"Ingram Day Lumber Co.,

McLouth advised tugs contract cancelled. Stop further shipment pending instructions.

(Signed) John J. Manley."

Under date of September 17th, 1919, the Fleet Corporation by letter formally cancelled McLouth's contract. At the time of cancellation plaintiff's contract was partly performed, and partly unperformed. It brings this suit to recover among other items of damage, its loss of profits upon the unfulfilled portion of the contract. The suit was tried without a jury, and McLouth's contracts with the Fleet Corporation, the telegrams and letters to him from the Fleet Corporation suspending and cancelling the contract, were received in evidence, subject to the objection of the plaintiff that they were not material to the issues involved in the case. To the declaration filed in the suit against McLouth, and in the revived

suit against his personal representative after decease, the defendant pleaded the general issue. Some time after the case was heard and submitted defendant moved for leave to file an amended plea, setting up facts in relation to the making of the ship contracts with the Fleet Corporation and the cancellation thereof, to which motion plaintiff formally objected.

FINDINGS OF FACT

Upon consideration of the evidence, I have arrived at the following findings of fact:

(1) That at the time plaintiff's contract was entered into with McLouth the plaintiff knew that the lumber was to be furnished for the building of tugs, but did not know that McLouth had a contract with the Fleet Corporation, or that the tugs were being built for the Fleet Corporation.

(2) That if plaintiff's lost profits constitute a proper element of damage, that plaintiff's total damages amount to the sum of forty-two thousand seven hundred and eighty-nine dollars and ninety-six cents.

(3) That if plaintiff's lost profits under the contract are not an element of damage, that the plaintiff is entitled to the sum of six hundred and forty-seven dollars and sixty-five cents, with interest from the date of the suspension of the contract.

Before giving consideration to the principal issue of law involved, I dispose of the defendant's motion for leave to file an amended plea and the objection thereto. This case was tried without a jury. The defense sought to be pleaded in the amended plea was fully anticipated by the plaintiff, and was quite fully met both by evidence and argument. It did not at the time of trial claim surprise, and has not since asked to have the case reopened for the purpose of introducing further evidence to meet the issues raised by the proposed amended plea. It seems to me clear that the interests of justice demand, and that in the proper exercise of sound judicial discretion, that I ought to grant the motion of the defendant, and the objection to it is overruled.

The principal question involved is whether the plain-

tiff is entitled to recover its lost profits under the contract, it being contended by the plaintiff that the contract was breached by McLouth, and it being contended by the defendant that there was no breach, but that the contract was cancelled or frustrated by the action and under the direction of competent authority.

The case was ably argued and ably briefed by counsel both for plaintiff and defendant. Not stopping to discuss for the purpose of this determination the many cases which throw light on the so-called doctrine of frustration, or impossibility of performance resulting from the acts of the sovereign or competent authority, and which have been well classified by the plaintiff as, first charter party cases, where the vessel chartered has been taken over by the English or American government. Second, contracts directly with the United States government. Third, the English coronation cases. I come to the somewhat narrow issue of law presented, which may for the purpose of conciseness be stated as follows:

Does the Urgency Deficiencies Appropriation Act of June 15th, 1917, authorize the President, through his properly delegated agents, to cancel a contract between private persons for supplying material for ships to be built for the Emergency Fleet Corporation, and is such cancellation effective as to a party not advised of the purpose of, and parties to the ship building contract?

The Act of June 15th, 1917, relating to war time powers of the President, authorized the President to cancel through governmental agencies contracts for the purchase of ships or ship material. The power and authority thus vested in the President was delegated by him from time to time to the United States Shipping Board, Emergency Fleet Corporation. Principal reliance is placed by each party upon a decision of a Circuit Court of Appeals, in which the facts seem to approximate the facts in the instant case, the plaintiff relying upon.

American Chain Company vs. Interstate Iron & Steel Company, 291 Fed. 1006, decided June 27th, 1923, certiorari denied October 23rd, 1923, 263 U. S. 709, and the defendant relying upon.

Todd Drydock and Construction Corporation vs. Sumner Iron Works, 289 Fed. 217, decided May 7th, 1923, certiorari denied October 8th, 1923, 263 U. S. 700.

In the latter case the Circuit Court of Appeals for the Ninth Circuit apparently reached a conclusion different from that of the Circuit Court of Appeals for the Seventh Circuit in the former case. The Todd case, first decided, does not appear to have been considered in the Chain Company case, and is not cited therein.

The facts in each of the cases referred to are sufficiently set up in the opinions, and I will not restate them. The holding of the Todd case was to the effect that the authority conferred on the President by the Act of June 15th, 1917, to cancel any existing or future contract for the building, production or purchase of ships or material, is without limitation or restriction. A careful analysis of the Chain Company case would seem to indicate that it is not in conflict with the Todd case. In the former no government agency cancelled the contract in suit, or directed or required the original contractors to modify or cancel the contract. The contract was for a large quantity of standard material, only a small portion of which would have been used in completing buyer's contract with the Fleet Corporation, the court holding the inference to be not strained that the bulk of buyer's business was in making chains other than the anchor chains being supplied to the government.

It is vigorously urged, however, on the part of the plaintiff, that the circumstance in the instant case which brings it under the holding of the Chain Company case, and excludes it from the effects of the holding in the Todd case, is that in the instant case the plaintiff had no knowledge that the material furnished was to be used in fulfillment of a contract by McLouth with the Emergency Fleet Corporation, and that the statute referred to cannot be read into its contract unless the purpose for which the material was to be used was within the contemplation of the parties to the contract. It would appear, however, even in the Chain Company case, relied upon by plaintiff, that the seller's knowledge as to the purpose for which the material was to be used was con-

sidered immaterial. In view of the foregoing I am of the opinion that the instant case is ruled by the decision in the Todd case, and not by the decision in the Chain Company case.

Judgment may be entered in favor of the plaintiff, and as against the defendant, for such compensation as may adequately compensate the plaintiff, not to include profits lost upon the unfulfilled portion of the contract. This amount I have already indicated has been found to be the sum of six hundred and forty-seven dollars and sixty-five cents, with interest from the date of the suspension of the contract, May 6th, 1919.

Charles C. Simons,
U. S. District Judge.

Detroit, Mich., May 29, 1925.

JUDGMENT

(Entered June 1, 1925, by Simons, J.)

This cause having been heretofore duly noticed and coming on for hearing, and the court having heard the proofs adduced and the arguments of counsel for respective parties, and the matter submitted with leave to file briefs, and briefs having been filed, and the court having taken time to carefully read and consider the briefs submitted, and being fully advised in the premises, does now here,

Order that plaintiff recover from defendant damages in the sum of six hundred forty-seven dollars and sixty-five cents ($647.65), with interest from the date of the suspension of the contract, to-wit: May 6th, A. D.

1919, together with costs to be taxed, and that plaintiff have execution therefor.

ORDER EXTENDING TIME FOR SETTLING BILL OF EXCEPTIONS

(Entered June 19, 1925).

On motion of Miller, Canfield, Paddock & Stone, attorneys for the plaintiff in the above entitled cause, it is ordered that the time for settling the bill of exceptions in the above entitled cause, may be and hereby is extended sixty (60) days.

Dated June 19, 1925.

Charles C. Simons,
U. S. District Judge.

BILL OF EXCEPTIONS

(Filed Aug. 3, 1925).

The issue joined between the parties in this case having been brought on to be heard on the 8th day of May, A. D. 1924, before the Honorable Charles C. Simons, District Judge, and both parties being ready, and a jury having been duly waived, counsel for plaintiff—to maintain said issue on its part—offered in evidence the contract sued upon, in words and figures as follows:

"INGRAM-DAY LUMBER COMPANY

Lyman, Miss., 2/5/1919.

Sydney C. McLouth, Esq.,
Marine City, Michigan.

Dear Sir:

In accord with verbal understanding this day had with your Mr. Jno. J. Manley, we are entering your order as follows. From your schedule dated 12/13/18 headed "Balance of Flitches required to complete four tugs."

Dense Merchantable Yellow Pine

Rough, Bark Edge Flitch 192 pcs. 9x27 or wider 8'
" " " " 9x30 or wider 300' lin.
" " " " 9x26 or wider 1280' "
" " " " 9x24 or wider 868' "
" " " " 9x22 or wider 2153' "
" " " " 9x20 or wider 1977' "
" " " " 9x18 or wider 4032' "

These items to be in long lengths, the number of lineal feet of each width the Flitch contains to be counted separately. No face to be less than 18".

" " " " 16 pcs 10x30 or wider 8'
" " " " 16 pcs 10x30 or wider 9'
" " " " 16 pcs 10x30 or wider 10'
" " " " 48 pcs 10x18 or wider 4'
" " " " 48 pcs 10x18 or wider 6'
" " " " 48 pcs 10x18 or wider 8'
" " " " 48 pcs 10x16 or wider 8'

The above being in all approximately 227,000'.

And from your schedule dated 1/9/19 headed contract No. 457 W. C. Timber order for Tugs, etc.

Dense Merchantable Yellow Pine

15 Pcs. 14x14 46' S4S to 13¾x13¾
5 " " 16' " "
5 " " 38' " "
10 " " 46' " "
5 " " 16' " "

10	"	12x14	28' "	11¾x13¾
10	"	"	46' "	"
5	"	"	14' "	"
20	"	"	46' "	"
5	"	"	38' "	"
5	"	"	28' "	"
5	"	14x16	20' "	13¾x15¾
5	"	14x14	14' "	13¾x13¾
5	"	12x12	14' "	11¾x11¾
5	"	"	16' "	"
10	"	10x10	18' "	9¾x 9¾
5	"	14x14	14' "	13¾x13¾
5	"	"	22' "	"
5	"	10x14	10' "	9¾x13¾
10	"	10x12	44' "	9¾x11¾

Rough Bark Edge Flitch		120 Pcs. 9x26 or wider	14'
"		240 Pcs. 9x24 or wider	12'
"		9x30 or wider	580 lin. ft.
"		9x27 "	2100 "
"		9x26 "	1600 "
"		9x24 "	1860 "
"		9x22 "	2910 "
"		9x20 "	4000 "
"		9x18 "	7100 "
"		9x16 "	1880 "
"		9x14 "	2500 "

These items to be in long length. The number of lineal feet of each width the flitch contains to be counted separately. No face to be less than 14".

30	Pcs.	3x9	—16' S4S	to 2¾x8¾
30	"	"	20' "	"
5	"	10x10	26' "	9¾x9¾
60	"	8x8	16' "	7¾x7¾
10	"	"	14' "	"
45	"	"	12' "	"
20	"	"	10' "	"

10 " 6¼x12 22' S2S 6x12
10 " " 24' " "
10 " " 28' " "
10 " " 32' " "
10 " " 36' " "
10 " " 38' " "
90 " " 40' " "
10 " " 42' " "
30 " " 44' " "
10 " " 48' " "

4¼x12—28 to 40' 6000 lin. ft. S2S to 4x12
8 x12—30 to 50' 16500 lin. ft. S2S to 7¾x12
7 x12—24 to 46' 7200 lin. ft. S2S to 6¾x12
2¼x12— 1400 lin. ft. S2S to 2x12

10 Pcs. 6x9 —40' S4S to 5¾x8¾
20 " " 34' " " "
10 " " 30' " " "
50 " 4¼x8 42' " " 4x7¾
50 " " 40' " " "
50 " " 38' " " "
50 " " 32' " " "
10 " 8x10 32' " " 7¾x9¾
10 " " 38' " " "
20 " " 40' " " "
30 " 8x12 40' S2S " 7¾x12
10 " " 20' " " "
10 " 5¼x12 28' " " 5x12
10 " " 36' " " "
10 " " 32' " " "
10 " " 40' " " "
5 " 10x12 28' S4S " 9¾x11¾
15 " " 30' " " "
30 " 10x10 30' " " 9¾x9¾
5 " 10x12 28' " " 9¾x11¾
35 " 10x10 28' " " 9¾x9¾
25 " " 26' " " "
30 " " 24' " " "
10 " " 22' " " "
10 " " 20' " " "
10 " " 18' " " "

10	"	"	16'	" "	9¾x9¾
5	"	"	14'	" "	"
10	"	10x10	12'	" "	9¾x9¾
30	"	"	10'	" "	"
30	"	9x10	9'	" "	8¾x9¾
20	"	10x12	6'	" "	9¾x11¾
160	"	10x10	6'	" "	9¾x9¾
10	"	10x10	4'	" "	"
20	"	10x14	4'	" "	9¾x13¾

Send suitable lengths to cut these pieces.

60	"	10x10	3'	" "	9¾x9¾
35	"	8x10	28'	" "	7¾x9¾
15	"	"	26'	" "	"
5	"	"	24'	" "	"
10	"	10x10	24'	" "	9¾x9¾
10	"	8x10	22'	" "	7¾x9¾
15	"	"	20'	" "	"
10	"	"	18'	" "	"
5	"	"	16'	" "	"
5	"	"	14'	" "	"
5	"	10x10	14'	" "	9¾x9¾
10	"	6x10	12'	" "	5¾x9¾
5	"	8x10	12'	" "	7¾x9¾
5	"	8x10	8'	" "	"
20	"	9x10	7'	" "	8¾x9¾
5	"	8x10	6'	" "	7¾x9¾

Send suitable lengths to cut these pieces.

10	"	10x10	24'	" "	9¾x9¾
10	"	"	26'	" "	"
10	"	"	30'	" "	"

4¼x12—20 to 46' 11000 lin. ft. S2S to 4x12
4¼x 8—20 to 40' 13000 lin. ft. S2S to 4x8
4¼x10—20 to 40' 15000 lin. ft. S2S to 4x10
5¼x 8—20 to 40' 11200 lin. ft. S2S to 5x8

20	Pcs.	5¼x12—24'		S2S	to 5x12
20	"	"	30'	"	"
20	"	"	36'	"	"
40	"	"	40'	"	"

3¼x6 3400 lin. ft. S2S to 3x6
3¼x4 5000 " " " 3x4

4¼x6 1700 " " " 4x6
2¼x4 1700 " " " 2x4

10 Pcs. 5x22" or wider 24' S2S 4¾" Thick—Bark Edges
20 " 5x24" " 24' " " "
10 " 5x18" " 24' " " "
10 " " " 46' " " "
10 " 5x22" " 36' " " "
5 " 5x24" " 16' " " "

3¾x4¼ 45000 Bd. ft. S4S 3½x4 Edge Grain
Edge grain is to be on the four-inch side of the timber.

5 " 5x6—20' S2S to 4¾x6
10 " " 30' " "
10 " " 32' " "
10 " " 24' " "
15 " 5x14 10' " 4¾x14
5 " 5x16 8' " 4¾x16

2¼x6—16 to 28' 6500 Bd. ft. S4S to 2x5¾

20 " 5x18 14' S2S to 4¾x18
10 " " 18' " 4¾x16
20 " 5x16 24' " 4¾x16
10 " 5x14 30' " 4¾x14
10 " 5x16 18' " 4¾x16
10 " 5x18 12' " 4¾x18
15 " 5x22 18' " 4¾x22
10 " 5x12 14' " 4¾x12
10 " " 20' " "
10 " 5x14 18' " 4¾x14
10 " 5x6 28' " 4¾x6
10 " " 36' " "
10 " " 26' " "
5 " 5x18 8' " 4¾x18
10 " 5x16 10' " 4¾x16
5 " 12x16 16' S4S 11¾x15¾
5 " " 14' " "
5 " " 12' " "
5 " 10x16 10' " 9¾x15¾
5 " 16x16 7' " 15¾x15¾

4x10 7500 bd. ft. Rough
1¼x10 10500 bd. ft. Rough

5 " 12x12 22' S4S to 11¾x11¾

your message to Marine City as I am unable to give you further details than mentioned in my telegram, namely that tug contracts had been cancelled, and that you were to stop shipments pending further instructions. I presume that an effort will be made to reinstate the contracts, but have no information whatever on the subject.

John J. Manley."

that following the receipt of the telegram and the above letter Mr. Manley visited plaintiff's offices and an interview between the witness and Mr. Manley took place, at which interview the witness proposed that plaintiff would accept cancellation for the unshipped balance, provided it was paid for its losses including the loss of anticipated profits, on that part of the contract unperformed, which offer of plaintiff was not accepted; that thereafter the United States Shipping Board Emergency Fleet Corporation requested plaintiff to furnish a statement of its actual expenses incurred under the contract which plaintiff refused to do, insisting upon its right to anticipated profits; that after May 6, 1919, no lumber was manufactured for delivery under the contract; that the 115,000 feet upon which plaintiff was engaged at that date was never completed for delivery under the contract, but was remanufactured into sizes and dimensions suitable for sale in plaintiff's regular trade and was sold in the ordinary course of its business; an effort was made to secure a reinstatement of McLouth's contracts which effort failed; the 115,000 feet was not remanufactured or sold until after the final cancellation of the contract; that the fair market value of 115,000 feet upon which plaintiff was engaged on May 6, 1919, was $1,725.00; that the cost to plaintiff of completing the manufacture and loading on the cars, of the lumber remaining to be manufactured under the contract would have been:

For timber	$10,000.00
For logging	4,800.00
For milling	2,500.00
For dressing	1,300.00
For loading	800.00
Total	$19,400.00

that deducting from the total contract price of the lumber remaining to be manufactured the cost of manufacturing the same would have left plaintiff a profit for completing the contract of $42,789.96.

Plaintiff offered in evidence deposition of

F. W. PETTIBONE,

who testified substantially as follows:

That he has been engaged in the lumber business for thirty years and upwards; that at the present time he is manager for the Edward Hines Yellow Pine Trustees, manufacturing and selling yellow pine lumber; that he was familiar with the bill of lumber ordered by McLouth from the plaintiff; that the fair market value of the 115,000 feet of lumber in the condition in which it was at the time the contract was suspended was $1,725.00 that the cost of manufacturing lumber including stumpage, overhead, logging, dressing, loading and all proper items of cost for the first six months of 1919 was $25.00 per thousand feet.

Plaintiff then offered in evidence the deposition of

A. S. MITCHELL,

who testified substantially as follows:

That he is secretary and general manager of the plaintiff and that he has been engaged in the lumber business for more than twenty years; that he is familiar with the terms and conditions of the contract entered into on February 5, 1919, between plaintiff and Sidney C. McLouth; that after entering into said contract plaintiff immediately entered upon performance thereof and between February 5, 1919, and May 6, 1919, did manufacture and deliver F. O. B. cars at its mills 617,336 feet of lumber as called for by said contract, all of which was accepted by Mr. McLouth and paid for at the contract price; that prior to May 6, 1919, in addition to the lumber that had been manufactured and delivered, plaintiff had partially manufactured 115,000 feet more; that the only thing remaining to be done on the 115,000 feet to complete the manufacture of the same was dressing and

that by the expenditure of about $400.00 more plaintiff could have completed the manufacture thereof and loaded the same on the cars at its mills; that the salvage value of the 115,000 feet on May 6, 1919, was about $1,725.00; that plaintiff could have completed the manufacture of the balance of the lumber called for under the contract at the cost of $19,400.00, which deducted from the contract price of the lumber remaining to be manufactured would leave $42,789.96, the amount plaintiff would have made as profit if it had been allowed to complete the contract; that after the receipt of the telegram of May 6, 1919, and the letter of May 7, 1919, from John J. Manley no further lumber was actually manufactured under the contract; that the 115,000 feet upon which plaintiff was then engaged was never completed under the contract, but that the same was remanufactured into different sizes and dimensions and sold in plaintiff's regular trade.

Plaintiff then offered in evidence the deposition of

H. N. RUSSELL,

who testified substantially as follows:

That he had been engaged in the lumber business for approximately twenty years; that he had examined the bill of lumber ordered by McLouth from plaintiff and that, from his experience as a lumber man in the south, in his opinion the cost of manufacturing the lumber remaining to be manufactured under the contract would be substantially as testified to by Mr. Wilson and Mr. Mitchell.

The defendant, to maintain and prove the issue on its part called as a witness

JOHN J. MANLEY,

who being duly sworn, testified substantially as follows:

That he is a resident of Chicago, Illinois, and during the years 1918 and 1919, was engaged in the lumber business at Chicago; that during that time he was acting as purchasing agent for Sidney C. McLouth and that he carried on the preliminary negotiations with Ingram

Day Lumber Company, on behalf of McLouth, which resulted in the contract of February 5, 1919; that his recollection was that the original schedules or specifications of lumber as submitted to the plaintiff, showed on their face that the tugs were being built for the government. He also testified that in the negotiations he orally informed plaintiff's officers that the tugs for which the lumber was intended were tugs being built for the government.

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said witness, being presented with said schedules or specifications, testified that these schedules showed the lumber was required for tugs, but nowhere showed that they were for government tugs; and that he could not say that any of the schedules which came to the Ingram-Day Lumber Company had any reference to the tugs being government tugs; he also stated that he could not state positively that he informed plaintiff's officers orally, prior to the execution of the contract of February 5, 1919, that the lumber was required to be used in tugs being constructed for the government.

He testified that a flitch as referred to in the specifications for the lumber ordered is a plank sawn right through the log with the bark on, not being edged up and is used in the ribs of the hull of a ship or tug. Before the flitch is used in a vessel the bark is all taken off by the lines cut by the ship manufacturer.

The defendant then offered in evidence two contracts dated respectively, August 21, 1918, and September 17, 1918, which said contracts were marked "Defendant's Exhibit Nos. 6 and 7," respectively.

To the introduction of each of said contracts plaintiff, by its counsel, did then and there object for the reason that each of said contracts were immaterial to the issues in this case the plaintiff having no privity of contract with the United States Shipping Board Emergency Fleet Corporation; not being shown to have any knowledge of these contracts at the time of entering into the contract upon which this suit is brought. The court over-

ruled plaintiff's said objection to the introduction of each of said contracts and each of said contracts was received in evidence and counsel for the plaintiff then and there duly accepted to the ruling and decision of the court.

Said Exhibit No. 6 was in part as follows:

"Contract No. 457—W. C. Hull Nos. 2415-2418 Incl.

Contract made this twenty-first day of August nineteen hundred eighteen, between Sidney C. McLouth, an individual, party of the first part (herein called the contractor) and the United States Shipping Board Emergency Fleet Corporation, corporation organized under the laws of the District of Columbia, (herein called the owner) representing the United States of America party of the second part. * * * * *"

Subsequent clauses provide for the construction of four complete ocean going tugs for the lump sum price of $232,000.00 each; the dates when the vessels were to be delivered; dates when payment were to be made and such usual provisions as are found in shipbuilding contracts.

Clause 5 of said contract was as follows:

"It is agreed that the title to all vessels, either completed or under construction insofar as they shall have been inspected and approved by the owner shall be in the United States of America. * * * *"

Defendant's Exhibit 7 as read in evidence was No. 457 Sup. and except as to dates and the number of tugs to be constructed was in every respect identical with Exhibit No. 6.

The defendant then called as a witness

WALTER M. SANDERS,

who being duly sworn testified substantially as follows:

That during the years 1918 and 1919 he was assistant to one of the Vice Presidents of the United States Shipping Board Emergency Fleet Corporation; that said Vice President was in charge of cancellations and adjustments; part of the time Charles Piez was such Vice President and at other times J. L. Ackerson; that he knew

there were two contracts entered into in 1918 between Sidney C. McLouth and the Fleet Corporation representing the government, to build nine ocean going wooden tugs. Witness was then shown a telegram marked "Defendant's Exhibit No. 8," dated April 29, 1918, and said he sent such telegram to Mr. McLouth; that the sending of such telegram was the usual method employed in cancelling contracts that had been entered into by the Fleet Corporation, representing the government, for shipbuilding material; he had no definite knowledge as to whether McLouth notified all sub-contractors or persons with whom he made contracts for materials for those tugs, but all contractors were instructed to notify sub-contractors in every case and such instructions were given McLouth in the telegram he sent.

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he stated that Mr. McLouth was not an officer of the Fleet Corporation.

Defendant's Exhibit No. 8, being the telegram identified by such witness was here offered in evidence.

Plaintiff's counsel then and there objected to the admission of said telegram for the reason that the same was immaterial and res nullius and because there was no privity of contract between the plaintiff and the Fleet Corporation, which said objection the court then and there overruled and the said telegram was received in evidence.

To which said ruling and decision of the court plaintiff by its counsel then and there duly excepted.

Said telegram as read in evidence was as follows:

"April 29, 1919.

"Sidney C. McLouth Co.,
Marine City, Michigan.

By direction of the board of trustees you are directed to suspend all work on hulls No. 2418, 2716, 2717, 2718, 2719, 2720, contract 457 and 457 Sup stop order all work stopped on commitments made by you as to these hulls and make no further commitments and expenditures as to them stop permission is hereby given you subject to

our final approval to solicit and accept domestic work for private account for tonnage substantially equivalent to the tonnage covered by this suspension order. Details follow by letter.

William Sanders,
Assistant to Director General in Charge of Cancellation."

The defendant here offered in evidence its Exhibit No. 9, being certified copy of a telegram sent by J. L. Ackerson, identified by Mr. Sanders as being vice president of the Fleet Corporation, dated August 20, 1919, addressed to Sidney McLouth, Marine City, Michigan, suspending the remainder of the hulls contracted for in the two contracts in evidence.

Plaintiff, by its counsel, then and there objected to the introduction of said telegram in evidence for the reason that said telegram was immaterial and res nullius, there being no privity of contract between the plaintiff and the Fleet Corporation, and for the further reason that said telegram was not signed by the Fleet Corporation.

The court overruled plaintiff's said objections and the said telegram was received in evidence, to which ruling and decision of the court in admitting the said telegram as evidence plaintiff by its counsel, duly excepted.

Said telegram as read in evidence was as follows:

"August 20, 1919.

"Sidney McLouth,
Marine City, Michigan.

By direction of the board of trustees you are directed to suspend all work on hulls No. 2415 to 2417 inclusive, contract No. 457 stop order all work stopped on commitments made by you as to these hulls and make no further commitments or expenditures as to them stop will you come to Philadelphia at once and bring list of material and equipment on order for suspended boats. This information is required by cancellation section stop details follow by letter.

J. L. Ackerson,
Vice President."

The defendant then offered in evidence its Exhibit No. 10, purporting to be a certified copy of a letter from the Fleet Corporation to Sidney C. McLouth, dated September 17, 1919.

The plaintiff, by its counsel, then and there objected to the introduction of said letter for the reason that same is immaterial and res nullius, and because there is no privity of contract between the Fleet Corporation and the plaintiff. The court overruled plaintiff's said objection and the said letter was received in evidence.

Plaintiff, by its counsel, then and there excepted to the said ruling and decision of the court in overruling said objection and in receiving said letter in evidence.

Said letter as read in evidence was as follows:

"September 17, 1919.

"Sidney C. McLouth,
Marine City, Michigan.

Gentlemen:

Tugs 2415 to 2417 inclusive were suspended on August 20, 1919, and hull 2418 was suspended on April 29, 1919; hulls 2716 to 2720 inclusive were suspended on April 29, 1919. It has been decided that no further work will be done on these boats; therefore we are issuing definite cancellation order:

By direction of the board of trustees your contracts 457 and 457 Sup. are hereby cancelled as to hulls Nos. 2415 to 2418 inclusive and hulls Nos. 2716 to 2720 inclusive; and you are hereby directed to notify all sub-contractors affected by this cancellation.

This cancellation in no way affects the negotiations which are under way with the cancellation and adjustment section in connection with the adjustment of this contract.

In the suspension notice heretofore sent you, you were directed to make no further commitments in connection with the construction of the above mentioned hulls.

Please acknowledge receipt of this letter.

Yours very truly,
United States Shipping Board
Emergency Fleet Corporation."

The defendant then rested its case.

Plaintiff in rebuttal called as a witness,

I. C. WILSON,

who being first duly sworn testified substantially as follows:

That he was the same I. C. Wilson whose deposition had previously been taken and witness was then shown schedules of lumber which had been exhibited to the witness John J. Manley and Mr. Wilson testified that those schedules and specifications were the original ones submitted to Ingram-Day Lumber Company by John J. Manley, agent for McLouth, prior to entering into the contract of February 5, 1919, between Ingram-Day Lumber Company and McLouth. Said schedules were offered and received in evidence. The witness then testified that at the time the contract of February 5, 1919, between Ingram-Day Lumber Company and McLouth was entered into, neither said company nor any of its officers had any knowledge of McLouth's contract with the government for the construction of tugs; that at the various conferences between Mr. Manley, agent for McLouth, and the officers of the Ingram-Day Lumber Company, at all of which witness was present, Mr. Manley never advised them of the existence of a contract between McLouth and the government; that the first knowledge the Ingram-Day Lumber Company had of the fact that McLouth was building tugs for the government was at a conference with Mr. Manley after the receipt of the telegram of May 6, 1919. When the plaintiff entered into the contract of February 5, 1919, it had no particular interest for whom McLouth was building vessels, for the reason that plaintiff, prior to entering into this contract had investigated McLouth's credit rating and found the same to be satisfactory, his rating being approximately one half million dollars.

On

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witness testified that he knew of several shipyards on the

gulf coast that in February of 1919 were engaged in building vessels for private owners and not for the United States.

Plaintiff rested.

The evidence being closed, counsel for the plaintiff requested the court to make the following special findings of fact and conclusions of law.

REQUEST FOR FINDINGS OF FACT

FIRST

That the plaintiff in this case is a Wisconsin corporation. That the original defendant in this case was a citizen and resident of the State of Michigan. That after this cause was at issue the original defendant, Sidney C. McLouth, died; his death having been suggested to the court, said cause was properly revived against his administrator, The American Loan and Trust Company, a Michigan corporation.

SECOND

That on to-wit: February 5th, 1919, the plaintiff and said McLouth entered into a certain written contract, set forth as Exhibit "A" of plaintiff's declaration. This contract was slightly modified by a subsequent agreement between plaintiff and said McLouth, evidenced by a letter of said McLouth's agent to plaintiff, dated Feb. 28, 1919, being Exhibit "C" of said declaration; plaintiff's letter to said McLouth dated March 3, 1919, being Exhibit "D" of said declaration; and telegram from said McLouth to plaintiff dated March 7, 1919, being Exhibit "E" of plaintiff's declaration; that under the terms of the contract of February 5th, 1919, as so modified, the plaintiff agreed to sell and the said McLouth agreed to buy 1,537,032 feet of especially cut and manufactured lumber at a contract price of $105,806.29.

THIRD

That prior to May 6th, 1919, in accordance with the

said contract between the parties of February 5th, as modified, the plaintiff had prepared and shipped to said McLouth 617,366 feet of lumber, which lumber the said McLouth had accpeted and paid for.

(Depositions page 13).

FOURTH

On May 6, 1919, McLouth directed plaintiff to suspend further shipments and thence forward refused performance of said contract on his part, although plaintiff continued to tender performance of its obligations thereunder.

FIFTH

That when the plaintiff received the said McLouth's telegram of May 6th, 1919, the plaintiff had then completed the manufacture and preparation of 115,000 feet of lumber, except for dressing and loading costs, that it would have cost the plaintiff the sum of $400 to dress and load this 115,000 feet and that the resale value of this 115,000 feet of lumber amounted to the sum of $1,725. Deducting from the contract price the cost of dressing and loading, and the resale value of this particular 115,000 feet from the contract price of same, there is a balance due the plaintiff on this item amounting to the sum of $5,918.10. (Depositions pages 13-14-15).

SIXTH

That after deducting from the original contract the 617,366 feet set forth in the Third finding of fact and the 115,000 feet set forth in the Fifth finding of fact, the balance to be furnished under the contract amounted to 804,696 feet. (Depositions page 13).

SEVENTH

That on May 6th, 1919, the 804,696 feet set forth in the sixth finding of fact was still in the trees, but all original preparations for the manufacture of this lumber, such as railroad facilities, the selection of the trees and

the building of logging roads had been completed by the plaintiff. (Depositions pages 8 and 44-45).

EIGHTH

That it would have cost the plaintiff to complete the manufacture of the 804,696 feet of lumber referred to in the Sixth and Seventh findings of fact the sum of $19,400, which amount is derived from the total of the following items:

For Timber	$10,000.00	
" Logging	4,800.00	
" Milling	2,500.00	
" Dressing	1,300.00	
" Loading	800.00	$19,400.00

(Depositions pages 21 and 46-47-48).

NINTH

That the contract price of the 804,696 feet referred to in the Sixth, Seventh and Eighth findings of fact amounted to the sum of $56,271.86. Deducting from the contract price the cost of manufacturing this lumber as appears from the Eighth finding of fact, I find a balance due to the plaintiff on this item amounting to the sum of $36,871.86.

TENTH

That the plaintiff was at all times able, ready and willing to perform the contract on its part, but said McLouth refused further performance on his part as found in the Fourth finding above.

ELEVENTH

That prior to entering into the contract of February 5th, 1919, the defendant furnished plaintiff certain schedules showing the size and quality of lumber required by the defendant, I find that these schedules nowhere mention that defendant had a contract with the United States government or any agency thereof.

TWELFTH

That the contract of February 5th, 1919, between plaintiff and McLouth and the subsequent modifications thereof, contain no provision whatsoever providing for cancellation thereof.

FOURTEENTH

I further find that the first knowledge plaintiff had that McLouth was engaged in fulfilling a contract with the United States government or any agency thereof, was after the receipt by plaintiff of a telegram from McLouth under date of May 6, 1919.

FIFTEENTH

That the United States government, or any agency thereof, never modified, suspended, cancelled or requisitioned the contract of February 5th, 1919, between plaintiff and McLouth.

CONCLUSION OF LAW

FIRST

That the pleas filed on behalf of Sydney C. McLouth and the American Loan & Trust Company, administrator of the estate of Sydney C. McLouth, deceased, were pleas of non assumpsit, no notices of special defense having been attached to the pleas under Rule 44 of this court. All evidence of McLouth's dealings with the United States government, or any agency thereof, is inadmissible and is excluded.

SECOND

There being no privity of contract between plaintiff and the United States government, or any agency thereof, and the United States government never having cancelled, modified, suspended or requisitioned the contract between plaintiff and McLouth, the Act of June 15th, 1917, (40 United States Statutes at Large 182), has no application to the facts in this case.

THIRD

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to a judgment in the sum of $42,789.96, together with interest at 5% from August 5, 1918.

Counsel for plaintiff and counsel for defendant then submitted to the court their briefs on the law.

And afterwards, to-wit, on August 12, 1924, the defendant filed its petition for leave to amend its plea to the granting of which plaintiff formally objected, and on September 17, 1924, said petition was argued and submitted.

And afterwards, to-wit, on June 1, 1925, the court made and filed the following special findings of fact:

(1) That at the time plaintiff's contract was entered into with McLouth, the plaintiff knew that the lumber was to be furnished for the building of tugs, but did not know that McLouth had a contract with the Fleet Corporation, or that the tugs were being built for the Fleet Corporation.

(2) That if plaintiff's lost profits constitute a proper element of damage, that plaintiff's total damages amount to the sum of forty-two thousand seven hundred eighty-nine and 96/100 dollars ($42,789.96).

(3) That if plaintiff's lost profits under the contract are not an element of damage, that the plaintiff is entitled to the sum of six hundred and forty-seven and 65/100 dollars ($647.65), with interest from the date of the suspension of the contract.

And on the same day the court filed in said cause his written opinion and entered judgment in favor of the plaintiff and against the defendant, for the sum of six hundred and forty-seven and 65/100 dollars ($647.65) with interest, to which entry of judgment, and to the failure of the court to find as requested in plaintiff's request for special findings of fact number fifteen, and to the failure of the court to find as requested in plaintiff's conclusions of law numbered one, two and three, the plaintiff duly excepted and was allowed exceptions severally thereto.

And inasmuch as none of said exceptions so taken, as aforesaid, appear of record in this cause, this bill of exceptions is settled and signed by said District Judge on this 3rd day of August, A. D. 1925, on the prayer of said plaintiff, to which day the time was duly extended.

Charles C. Simons,
District Judge.

O. K., Delos G. Smith,
United States Attorney and as
Attorney for Defendant.

O. K., Miller, Canfield, Paddock & Stone,
Attorneys for Plaintiff.

PETITION FOR WRIT OF ERROR

(Filed July 13, 1925).

And now comes Ingram-Day Lumber Company, plaintiff herein, and says that on or about the first day of June, A. D. 1925, this court entered judgment herein in favor of this plaintiff, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly

authenticated, may be sent to the said Circuit Court of Appeals.

W. A. White,
Miller, Canfield, Paddock & Stone,
Attorneys for Plaintiff.

ASSIGNMENT OF ERRORS

(Filed July 13, 1925).

Now comes the plaintiff, the Ingram-Day Lumber Company, and says that in the proceedings, record and judgment in said cause, there is manifest error and for assignment thereof says:

First: The court erred in permitting the witness, John J. Manley, to answer the following question:

"State whether or not you had a discussion with them in which they were informed as to the purposes for which the lumber that was being contracted for, was desired by Mr. McLouth?"

Second: The court erred in permitting the witness, John J. Manley, to answer the following question:

"State whether or not the specifications by the Fleet Corporation of the dimensions and character of the ships and its materials were present and used in estimating the price of the contract—the price of the lumber to be sold?"

Third: The court erred in permitting the witness, John J. Manley, to answer the following question:

"State whether or not at that time, or at any time in visiting them, you carried to them a copy of the con-

tracts under which McLouth was building these tugs?"

Fourth: The court erred in receiving in evidence Defendant's Exhibit 6.

Fifth: The court erred in receiving in evidence Defendant's Exhibit 7.

Sixth: The court erred in receiving in evidence Defendant's Exhibit 8.

Seventh: The court erred in receiving in evidence Defendant's Exhibit 9.

Eighth: The court erred in receiving in evidence Defendant's Exhibit 10.

Ninth: The court, having found as a matter of fact that plaintiff's lost profits amounted to the sum of forty-two thousand seven hundred and eighty-nine dollars and ninety-six cents, ($42,789.96) erred in finding as a matter of law that plaintiff's lost profits did not constitute a proper element of damage.

Tenth: The court, having found as a matter of fact that plaintiff's lost profits amounted to the sum of forty-two thousand seven hundred and eighty-nine dollars and ninety-six cents ($42,789.96), erred in rendering judgment for the plaintiff in the sum of six hundred forty-seven dollars and sixty-five cents ($647.65).

Eleventh: The court, having found as a fact that at the time plaintiff entered into its contract with McLouth it had no knowledge of McLouth's contract with the Fleet Corporation, or that the tugs were being built for the Fleet Corporation, erred in holding as a matter of law that the cancellation by the Fleet Corporation of McLouth's contracts with it permitted McLouth in turn to cancel his contract with the plaintiff.

Twelfth: The court erred in permitting the defendant to file an amended plea.

Thirteenth: The court erred in failing to find as a matter of fact that the United States government, or any agency thereof, never modified, suspended, cancelled or requisitioned the contract of February 5th, 1919, between plaintiff and McLouth.

Fourteenth: The court erred in failing to find as a matter of law and fact that there was no privity of contract between plaintiff and the United States govern-

ment, or any agency thereof.

Fifteenth: The court erred in finding as a matter of law that the Act of Congress, known as Urgency Deficiencies Appropriation Act of June 15th, 1917 (40 United States Statutes at Large 182) authorized the President, through his properly delegated agents, to cancel the plaintiff's contract with McLouth.

Wherefore, the plaintiff prays that the judgment of said District Court may be reversed and said cause remanded to said District Court with instructions to enter a judgment for the plaintiff in the sum of forty-two thousand seven hundred and eighty-nine dollars and ninety-six cents ($42,789.96), together with interest at five per cent (5%) from August 5th, 1918.

W. A. White.
Miller, Canfield, Paddock & Stone.

ORDER ALLOWING WRIT OF ERROR

(Entered July 13, 1925).

This 13th day of July, A. D. 1925, came the plaintiff by its attorneys, and filed herein and presented to the court its petition, praying for the allowance of a writ of error and an assignment of errors intended to be urged by it, praying, also, that a transcript of the record, proceedings and papers in this cause upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the sixth judicial circuit, and that such other and further proceedings may be had as may be proper in the

premises.

On consideration whereof, the court does allow the writ of error upon the plaintiff giving bond according to law in the sum of two hundred and fifty dollars ($250.00).

Charles C. Simons,
U. S. District Judge.

BOND ON WRIT OF ERROR

(Filed July 13, 1925).

Know all men by these presents that we, Ingram-Day Lumber Company, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the clerk of the District Court of the United States for the Eastern District of Michigan, or his successors in office, in the full and just sum of two hundred fifty dollars ($250.00) to be paid to the said clerk, his certain attorneys or successors in office, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents. Sealed with our seals, and dated this twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-five.

Whereas, lately at a session of the District Court of the United States for the Eastern District of Michigan, Southern Division, in a suit depending in said court, between Ingram-Day Lumber Company, plaintiff, and American Loan & Trust Company, administrator, defendant, a judgment was rendered against the said American Loan & Trust Company, administrator, and the said

Ingram-Day Lumber Company having sued out a writ of error to the United States Circuit Court of Appeals for the Sixth Circuit to reverse the judgment in the aforesaid suit;

Now, the condition of the above obligation is such, that if the said Ingram-Day Lumber Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

(Corp. Seal) Ingram-Day Lumber Company,
Per A. S. Mitchell, Secy. and Gen. Mgr.

Sealed and delivered in presence of:
Miss Eva Davidoff.
W. H. Baria.

American Surety Company of New York.
By Frederick L. Fraser,
Resident Vice-President.
Attest: Geo. I. Cloutier,
Resident Assistant Secretary.
(Corp. Seal)

WRIT OF ERROR

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

United States of America, Sixth Judicial Circuit, ss.
The President of the United States.
To the Honorable, the Judge of the District Court

of the United States for the Eastern District of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you or some of you, between Ingram-Day Lumber Company, plaintiff, and Sydney C. McLouth, revived against The American Loan & Trust Company, administrator defendant, a manifest error hath happened, to the great damage of the said Ingram-Day Lumber Company, plaintiff, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnai, in said Circuit, on the 12th day of August next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the 13th day of July, in the year of our Lord one thousand nine hundred and twenty-five, and of the Independence of the United States of America the one hundred and fiftieth.

Elmer W. Voorheis,
Clerk of the District Court of the United States
for the Eastern District of Michigan.
(Seal of the Court)

PRAECIPE FOR TRANSCRIPT OF RECORD

(Filed July 13, 1925).

To the clerk of said court:

You will please prepare transcript of the record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Sixth Judicial Circuit, under the writ of error heretofore allowed by said court, and include in the said transcript the following pleadings, proceedings and papers on file, to-wit:

Declaration.

Plea of defendant, Sydney C. McLouth.

Stipulation waiving jury.

Suggestion of death of defendant.

Appearance of American Loan & Trust Company, administrator.

Plea of American Loan & Trust Company, administrator.

Stipulation waiving jury.

Plaintiff's requests for findings of facts and conclusions of law.

Defendant's petition for leave to amend plea.

Defendant's amended plea.

Opinion of the court with findings of fact.

Order on opinion awarding plaintiff judgment.

Judgment.

Order extending time for settlement of bill of exceptions.

Bill of exceptions.

Petition for writ of error.

Assignment of errors.

Order allowing writ of error and fixing amount of bond.

Bond on writ of error.

Clerk's certificate to transcript of record.

Writ of error.

Praecipe for transcript of record.

Acknowledgment of service of praecipe.

Citation, with proof of service.

Said transcript to be prepared as required by law

and the rules of the United States Circuit Court of Appeals for the Sixth Circuit.

W. A. White,
Miller, Canfield, Paddock & Stone,
Attorneys for Plaintiff.

ACKNOWLEDGMENT OF SERVICE OF PRAECIPE

(Filed July 14, 1925).

Service upon the defendant in the above entitled cause of a copy of the plaintiff's praecipe for record, together with a copy of plaintiff's proposed bill of exceptions and notice that the same would be brought on to be heard on Monday, the 27th day of July, A. D. 1925, at the opening of court, or as soon thereafter as counsel may be heard, is hereby acknowledged.

American Loan & Trust Company.
Per J. C. Shaw,
Vice President.

Dated: July 14, 1925.

CITATION

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

United States of America, Sixth Judicial Circuit, ss.

To Sidney C. McLouth, revived against the American Loan & Trust Company, administrator of the estate of Sydney C. McLouth, deceased.

Greeting: You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals, Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, on the 12th day of August next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Michigan, wherein Ingram-Day Lumber Company is plaintiff-in-error, and you are defendant-in-error, to show cause, if any there be, why the judgment rendered against the said defendant-in-error in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this 13th day of July, in the year of our Lord one thousand nine hundred and twenty-five, and of the Independence of the United States of America the one hundred and fiftieth.

Arthur J. Tuttle,
United States District Judge.

Due and timely service of the within citation is hereby accepted.

American Trust Co.,
Formerly American Loan & Trust Co.,
By J. C. Shaw,
Admr. Sydney C. McLouth Estate.
Delos G. Smith,
U. S. District Attorney and
Attorney for Defendant-in-Error.
By Wallace Visscher,
Asst. U. S. Attorney.

ORDER EXTENDING TIME TO MAKE RETURN TO WRIT OF ERROR

(Entered August 12th, 1925).

Upon the application of the clerk of this court, for cause shown, it is by the court now here ordered that the time in which to file and docket printed record on writ of error in this cause, be and the same is hereby extended to and including the 12th day of September, A. D. 1925.

Arthur J. Tuttle,
United States District Judge.

ORDER EXTENDING TIME TO MAKE RETURN TO WRIT OF ERROR

(Entered September 12th, 1925).

Upon the application of the clerk of this court, for cause shown, it is by the court now here ordered that the time in which to file and docket printed record on writ of error in this cause, be and the same is hereby extended to and including the 12th day of October, A. D. 1925.

Arthur J. Tuttle,
United States District Judge.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPEARANCE OF COUNSEL

(Filed October 13, 1925)

ARTHUR B. MUSSMAN,
Clerk of said Court:

Please enter my appearance as counsel for the Plaintiff in Error.

MILLER, CANFIELD, PADDOCK & STONE,
Penobscot Bldg., Detroit, Michigan.
W. A. WHITE,
Gulfport, Mississippi.

CAUSE ARGUED AND SUBMITTED

(March 12, 1926—Before DENISON, DONAHUE AND MOORMAN, J.J.)

This cause is argued by Mr. William J. Shaw and Mr. Ferris D. Stone for the Plaintiff in Error and by Mr. Charles A. Meyer, Assistant United States Attorney and Mr. I. V. McPherson, Special Assistant to the Attorney General for the Defendant in Error and is submitted to the Court.

JUDGMENT

(Filed June 30, 1926)

Error to the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby affirmed with costs.

OPINION

(Filed June 30, 1926)

Before DENISON, DONAHUE and MOORMAN, Circuit Judges.

The plaintiff in error brought an action against McLouth to recover damages for breach of a contract by the terms of which the plaintiff agreed to manufacture and sell, and McLouth agreed to buy, at a specified price, approximately 1,500,000 ft. of lumber of different sizes and kinds. In pursuance of this contract the plaintiff manufactured and shipped to McLouth about 600,000 ft. of lumber for which McLouth paid the contract price. McLouth then cancelled the contract and refused to accept further shipments. No other lumber was manufactured or shipped and no further expense incurred by the Ingram-Day Company, after notice of cancellation.

It appears from the exhibits attached to the petition that this lumber was purchased and furnished for the completion of four tugs and that the price named in the original order was increased by reason of the fact that the American Bureau of Shipping required longer scarfs for sides, bilge and floor ceilings of the tugs than specified in the original order. The defendant filed a plea of the general issue without notice of any special defense. Before the trial of the cause McLouth died and the action was revived in the name of American Loan & Trust Company, who was appointed administrator of his estate. A written waiver of jury was filed and pending the trial by the court without the intervention of a jury and before judgment the defendant was given leave to file an amended plea in which in addition to the general denial it was further alleged in substance that in August and September of 1918, the United States Shipping Board Emergency Fleet Corporation, acting for and on behalf of the United States entered into two contracts with McLouth to construct for the United States Government nine wooden ocean going tugs at the price of $232,000.00 each. On February 5, 1919, McLouth entered into the contract in suit

with the Ingram-Day Lumber Company to manufacture and furnish the lumber to be used in the construction of four of these tugs. On April 29, 1919, the Fleet Corporation acting for and on behalf of the United States ordered and directed McLouth to suspend all work on hulls Nos. 2418, 2716 to 2720, inclusive, and to order all work stopped on commitments made by him as to these hulls, and make no further commitments and expenditures as to them. Permission was given to McLouth, subject to the final approval of the Fleet Corporation to solicit and accept domestic work for private account for tonnage, substantially equivalent to the tonnage covered by this suspension order, but it does not appear that McLouth obtained or could have obtained any private contract for any tonnage of like character. Defendant further alleged that on August 20, 1919, the Fleet Corporation further ordered McLouth to suspend all work on hulls Nos. 2415 to 2417, inclusive, and to order all work stopped on commitments made by him as to these hulls, and make no further commitments or expenditures as to them; that on May 6, 1919, McLouth notified the plaintiff his contract with the government had been cancelled; that by reason of the cancellation of these contracts by the Fleet Corporation under authority of the Shipping Fund Provision of the Urgency Deficiency Appropriation Act of June 15, 1917, and the executive order issued by the president of the United States on July 11, 1917, and December 3, 1918, McLouth without his fault was prevented from further performance of this contract; that under the terms of the Act above referred to the Ingram-Day Lumber Company is not entitled to recover damages, but only just compensation for whatever cost and expense it had actually incurred in reference thereto prior to notice of cancellation.

It further appears from the evidence that pending unsuccessful efforts by McLouth to induce the Fleet Corporation to reinstate these contracts, the plaintiff suspended work in the manufacturing and preparation of this lumber and made no further shipments to McLouth, but at the time it received the notice of suspension it had expended $2,372.65 in the partial manufac-

ture of 115,000 ft. of lumber of sizes and dimensions for which there was no general market, and after the final cancellation of the contract by the Fleet Corporation, September 18, 1919, plaintiff remanufactured this lumber and sold it at a loss of $647.65. The trial court entered a judgment in favor of the plaintiff in the sum of $647.65 with interest from the date of suspension of the contract with costs, and upon request of the plaintiff made the following finding of facts:

"(1) That at the time plaintiff's contract was entered into with McLouth, the plaintiff knew that the lumber was to be furnished for the building of tugs, but did not know that McLouth had a contract with the Fleet Corporation, or that the tugs were being biult for the Fleet Corporation.

"(2) That if plaintiff's lost profits constitute a proper element of damage, that plaintiff's total damages amount to the sum of forty-two thousand seven hundred and eighty-nine dollars and ninety-six cents.

"(3) That if plaintiff's lost profits under the contract are not an element of damage, that the plaintiff is entitled to the sum of six hundred and forty-seven dollars and sixty-five cents, with interest from the date of the suspension of the contract."

DONAHUE, Circuit Judge: It is claimed on the part of the plaintiff in error that the court erred to its prejudice in permitting the defendant to file its amended plea and in admitting evidence in reference to McLouth's contracts with the government, and their subsequent cancellation. A court has discretion to permit amendment to pleadings upon such conditions, as it shall, in its discretion and by its rules prescribe, Section 954, R. S. (Section 1591, Compiled Statute), *Mexican Central Ry. Co. v. Duthie*, 189 U. S. 76; *Mathison Alkali Works v. Mathison*, 150 Fed. 241 (Certiorari denied, 204 U. S. 674). The court did not abuse its discretion in permitting this amended plea to be filed and receiving this evidence, regardless of whether the amended plea was filed prior to the introduction of the evidence or after the introduction of the evidence to conform thereto.

The substantial question involved in this case is whether under the provision of the Act of June 15, 1917, and the "Emergency Shipping Fund" provision of the Urgency Deficiency Appropriation Act of October 6, 1917, and subsequent amendments and acts in reference thereto, the plaintiff's contract with McLouth is affected by the cancellation of McLouth's contract with the government. This Act authorized the president to exercise the power vested in him and expend the funds thereby and thereafter to be appropriated, through such agency or agencies as he from time to time determined. In pursuance of this authority the president by the executive orders of July 11, 1917, and December 3, 1918, directed that this power should be exercised by and through the United States Shipping Board Emergency Fleet Corporation. The Fleet Corporation therefore had the power to make this contract with McLouth and to suspend and cancel the same, upon making just compensation.

It is clear from this provision that it was not the intent or purpose of Congress that just compensation should be based upon loss of profits that might be earned in the completion of the contract. *Dusenbury Motor Corp.* v. *U. S.*, 260 U. S. 115.

The plaintiff relies largely upon the decision in the case of the *American Chain Co.* v. *Interstate Iron & Steel Co.*, 291 Fed. 1006, but the facts of that case are wholly different from the facts involved in this litigation. In that case the Chain Company had purchased from the Steel Company 4,800 tons of round iron bars from one to three inches in diameter of "standard sizes, shapes and sections, as are within sellers' regular range of practice." The Chain Company at that time had a contract with the Fleet Corporation to furnish 140 anchor chains, 2½ inches in diameter and of the total 4,800 tons less than 150 tons would be suitable for the manufacture of these anchor chains and none were manufactured for the specific purposes, but were sold from the regular stock in trade of the Steel Company.

In that case the court specifically found that the seller was not a sub-contractor, but an independent seller of its standard product which it was offering generally in